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FEB 18 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

No. 611. October Term, 1952.

MICHAEL STAREGO,
Petitioner,

v.

JOHN SOBOLISKI and MICHAEL STOFEGA,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

MICHAEL STAREGO, Plaintiff-Appellant, *vs.* JOHN SOBOLISKI and MICHAEL STOFEGA, Defendants-Respondents.	On Certiorari.

PETITION FOR REVIEW.

To the Honorable, the Chief Justice and the Justices of the Supreme Court of the United States:

Your petitioner, the Plaintiff-Appellant in the above entitled cause below, a citizen of these United States, resident in the City of Perth Amboy in the County of Middlesex and the State of New Jersey, respectfully shows:

1. Petitioner owns a lot of land upon which his home is built, abutting on Hall Avenue, one of the principal streets in the City of Perth Amboy. Adjoining his land on the east is the home and lot of the respondent Soboliski and adjoining Soboliski's lot on the east is the lot of the respondent Stofega with his home thereon. A 12″ water main ran under and along Hall Avenue at all times with which we are concerned and still so runs. The water pipes of the petitioner and the respondents were tapped into this main until 1944 when the respondents decided to tap into a 4″ main servicing a water hydrant in front of a school building across the street from the petitioner's home. The concrete

pavement in the street in front of the petitioner's home was dug up and the portion of the petitioner's land between his sidewalk and the curb was dug up and a service pipe was sunk and tapped into the said 4" main, run across Hall Avenue to a point between the sidewalk and curb on petitioner's property and across his property to the lands of the respondents and connected with their water pipes. Under New Jersey law a landowner abutting on a street owns the fee to the middle of the street subject only to the easement of passage in the public which includes *inter alia* the laying of water *mains,* but not *service pipes.* An action in trespass was instituted by the petitioner against the respondents for the return of petitioner's property and damages for the wrongful taking. The complaint alleged that the respondents pierced the petitioner's close with the water service pipe running under, across and through the land of the petitioner and servicing respondents' properties. The respondents denied the alleged trespass and denied that the service pipe pierced the petitioner's close and moved for summary judgment and filed affidavits in support of their motion alleging that the pipe did not lie within any part of petitioner's land and that the respondents had nothing to do with its installation except to complain of unsatisfactory water pressure and that the water department laid the pipe and *were not the agents of the respondents* in doing so. Petitioner in answers to interrogatories alleged the pipe was laid by *agents and servants of the respondents.* That all applicants for water service must employ the men of the department for the installation, was shown by petitioner's affidavit resisting motion for summary judgment. A summary judgment for the respondents was entered on the theory that there existed *no*

controversy on material issues of fact and that the petitioner failed to state a claim on which relief could be granted. Appeal was taken to the Appellate Division on the ground *inter alia* that petitioner's property was taken for a *private use.* In the *brief* filed on behalf of the respondents in this intermediate court, the *"service-pipe"* involved became a *"sub-main"* and this nomenclature was adopted by the Appellate Division as a *record fact* and it affirmed the summary judgment. Appeal was taken to the Supreme Court of New Jersey, the court of last resort in that state. Although it was pointed out in petitioner's brief and in oral argument that the *"service-pipe"* was changed to *"sub-main"* by the respondents' fiat and the *new name* had been adopted by the intermediate court despite that the record showed it to be a *service pipe,* the Supreme Court of New Jersey in its opinion adopts *"sub-main"* as the name and classification of the offending *service pipe* and in its turn, affirmed the summary judgment. Petitioner seeks a review of this denial of due process and the equal protection of the laws.

2. The United States Supreme Court has jurisdiction to review the judgment in question on the following basis: (a) private property of the plaintiff was taken for private use and this offends the 5th Amendment of the Constitution. (b) Petitioner was deprived of his property without due process of law and was denied the equal protection of the laws in violation of the 14th Amendment of the Constitution, Section 1. (c) Petitioner was denied the right to a trial.

3. The following questions are presented:

(a) Does the easement of passage in the public, subject to which the petitioner holds the fee to the

middle of the road on which his property abutts, include the right of the respondents to lay water service-pipes under, across and through his land?

(b) Can an Appellate Court change the record in the court below? and

(c) Where material facts in issue are controverted and the right to judgment in the movant not clear, can summary judgment be entered?

4. The following reasons are relied on for the allowance of the writ:

(a) If the judgment below is permitted to stand, an easement by adverse possession or prescription shall vest in 1964 under New Jersey law, making petitioner's land servient to that of the respondent's.

(b) Argument of counsel and opinions of courts are based upon "given facts" in the record. If it be permitted that important facts be changed in the course of the appellate procedure by counsel and such departure from the integrity of the record tolerated or overlooked by the appellate court and its opinion based upon such altered "given facts" justice becomes injustice and there is a denial of due process and denial of the equal protection of the laws.

(c) The offending installation in the trial court was a "*service pipe*"; whereas in the *brief* of the respondents on the first appeal became a "*submain*"; A main comes within the easement of passage in the public subject to which the petitioner holds his fee to the middle of the road whereas a service pipe is a private use and it does not fall within that public easement.

(d) Petitioner's property (private property) was taken for private use, without due process.

(e) The Supreme Court of New Jersey has decided the question of due process not in accord with the applicable decisions by the United States Supreme Court in *Missouri Pacific Railway Company* v. *State of Nebraska ex rel Board of Transportation of the State of Nebraska,* 164 U. S. 404, 41 L ed 489. *Brinkerhoff-Faris* v. *Hill,* 281 U. S. 673.

(f) The New Jersey Court has decided a federal question of substance not heretofore determined by the United States Supreme Court, namely that an appellate court may change an important and material fact in the record below and base its decision on such changed fact and thus deny due process, equal protection of the law and take away private property for private use without the owner's consent and without compensation.

Wherefore your petitioner prays that the Writ of Certiorari of this Honorable Court do issue directing the Supreme Court of New Jersey to send up its record in this cause for review so that right and justice may be done.

Respectfully,

PAUL C. KEMENY,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. .

MICHAEL STAREGO,
Petitioner,

vs.

JOHN SOBOLISKI and
MICHAEL STOFEGA,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

The Opinions Below.

The opinion of the court rendering the summary judgment appears at pages 27a, 28a, 29a and 30a Record and is unreported officially.

The opinion of the Appellate Division of the Superior Court of New Jersey, affirming the summary judgment appears at page 21a, 22a, 23a, 24a and 25a of the Record and is reported officially under the designation *Starego* v. *Soboliski, et al.*, 21 N. J. Super. 389. The Supreme Court of New Jersey in an opinion appearing at pages 31a, 32a, 33a and 34a of the Record and is reported under the designation *Starego* v. *Soboliski, et al.*, 93 A. 2d 169, 11 N. J.

, affirmed the summary judgment on December 22nd, 1952 and issued its Mandate on Affirmance on said date.

Jurisdiction.

The judgment of the Supreme Court of New Jersey was entered on December 22nd, 1952 (R.). This petition was presented within 90 days from the entry of the judgment below. Jurisdiction is invoked under Section 237 (b) of the Judicial Code, 28 U. S. C. Sec. 344 (b). The questions presented were raised by the entry of a summary judgment by the Chancery Division, Superior Court, Middlesex County, its affirmance by the Appellate Division of the Superior Court of New Jersey on changed facts dehors the record and an affirmance in its turn by the New Jersey Supreme Court of a judgment depriving petitioner of private property for private use, without his consent, without due process and without equal protection of the laws.

Questions Presented.

1. Did the New Jersey Court granting the summary judgment for the respondents err in holding that the City of Perth Amboy enjoys the absolute right to run a pipe, servicing the respondents, through the property of the petitioner?

   (a) Is the laying of a service pipe a public or street use within the public's easement of passage subject to which an abutting owner holds his fee to the middle of the road or is it a private use?

2. Did the Appellate Division err in changing a *"service pipe"* into a *"sub-main"* or in making the terms synonymous and thus making a *public* or *street use* out of a *private use* and in doing so did it depart from the integrity of the record and deny petitioner due process, equal protection of the laws and deprive him of private property for private use without his consent?

3. Did the Supreme Court of New Jersey err in affirming the summary judgment without passing upon the question of the deprivation of private property for private use and denial of due process and the equal protection of the laws by reason of the change of *service pipe* to *sub-main,* in adopting the changed fact dehors the record, in determining the question of agency which was a controverted issue of fact before the court rendering the summary judgment?

Statement.

Petitioner's land upon which his home is built abutts on Hall Avenue, a public street in the City of Perth Amboy, New Jersey. Adjoining his land on the east is the land and home of the respondent Soboliski and adjoining the latter's land on the east is the land and home of the respondent Stofega. Prior to 1944 the water service pipes of the respondents were tapped into a 12″ water main running along and under the centerline of Hall Avenue. In 1944, the respondents dug up petitioner's land across its width between his sidewalk and curb and dug up the street in front of the petitioner's home from the aforesaid trench the full width of Hall Avenue to a 4″ main servicing a fire hydrant across the street from the petitioner and laid a service pipe tapped

into the said 4" main and ran the said service pipe across, through and under the land of the petitioner and connected same with their respective home water systems. This was done over the objection and without the consent of the petitioner and without compensation to him. Petitioner instituted a suit out of the Superior Court, Chancery Division, Middlesex County against the respondents seeking the removal of the pipe and damages for the trespass. Respondents filed an answer denying the trespass and moved for summary judgment after affidavits and interrogatories were served and answered. The court hearing the motion for summary judgment decided that the Water Department of the City of Perth Amboy made the installation under an absolute right which it enjoys so to do. On appeal to the Appellate Division of the Superior Court, respondents in their brief renamed the *"service pipe"* a *"sub-main"* and this court adopted the changed fact and on the reasoning that a main is a *public use*, affirmed the summary judgment. On appeal to the Supreme Court of New Jersey this injustice and departure from the record was brought to their attention, but this court of last resort in its opinion not only ignored this denial of due process and equal protection of the laws, but in its own opinion treated the offending *service pipe* as a *submain*. The latter court further determined the fact question of agency which was a controverted material issue in the court rendering the summary judgment.

Summary of Argument.

Petitioner's submission is that his private property was taken from him for a private use, without his consent, violating the 5th and 14th Amendments of the Federal Con-

stitution and secondly that he was denied due process and the equal protection of the laws in that a summary judgment was rendered against him maugre the existence of challenge of material facts in issue and despite the fact that respondents were not entitled to judgment as a matter of law. He was further denied due process in the appellate division where an opinion rested upon a fact dehors the record (*sub-main* instead of *service pipe*) affirmed the summary judgment and when this injustice was brought to the attention of the court of last resort it not only ignored this prostitution of the integrity of the record but adopted this changed fact and proceeded to base its opinion affirming the summary judgment upon a determination by it of a controverted issue of fact that was before the court of original jurisdiction, namely, the question of agency.

Petitioner contends that the installation of a water *service* pipe is a *private use.* That the right to lay such pipe is in the abutting owner solely and that he must lay it in the portion of the sidewalk and street *fronting his* land and not that of another's. That the laying of a service pipe for anyone except the abutting owner forms no part of the public easement subject to which such abutting owner holds the fee to the middle of the street.

Petitioner contends that on an application for summary judgment neither the court hearing the application nor the appellate court can determine controverted issues of fact which are material and to do so is to deny due process and the equal protection of the laws and in the case at bar further constituting the deprivation of private property for private use.

Your petitioner further suggests that an appellate court is bound by the record before it and to base an opinion af-

firming a summary judgment erroneously entered upon the premise that a *service pipe* is a *submain* dehors the record is a denial of due process, the equal protection of the laws and the deprivation of private property for private use.

POINT 1.

The installation of a water service pipe by the abutting owner is a private use not within the public easement subject to which he holds the fee to the middle of the street and that right is in the abutting owner alone and can only be exercised in the sidewalk and street premises fronting his property.

The learned court below fell into error in determining that the City of Perth Amboy enjoys the absolute right to lay a service pipe supplying the respondents through the land of the petitioner.

The right of access to the street and its subsurface is in the abutter property owner for the purpose of connection with the water main and not in the city. (44 C. J. 946, sec. 3713). While this right may be regulated and controlled it cannot be denied to the abutter so long as it is exercised in accordance with coexisting public rights in the street (*ibid.*)

The owner of the fee in the street subject to the public easement, has the right to lay a pipe below the surface for the conveyance of water * * * subject to the use of the street by the public and has the right to make such excavations as will enable him to install the material or do the work requisite for the enjoyment of his rights in the land subject to such restrictions by the municipality as will

cause the least interruption of the public easement. (44 C. J. 954, sec. 3728).

This means that the right to lay pipe in front of the petitioner's property is in him, not in the city and not in the respondents. The latter have the right to lay service pipe in that part of the street upon which they are the *abutters* and owners of the fee and not in front of petitioner's land.

> "Such a right (to lay service pipe) however cannot be used as a subterfuge for the private benefit of one other than the abutting owner." 44 C. J. 954, sec. 3728.

The city has the right to regulate but the right to lay service pipe is in the abutter. In Perth Amboy a regulation of that right in the abutter is that the landowner must use the men of the Water Department for the *installation* of service pipe. This is an understandable regulation when it is considered that traffic problems require speedy refilling of street excavations. (Patten Affidavit, R. 14a and 15a).

An Ordinance of the City of Perth Amboy, Chapter 615 Approved July 31, 1908, and still in effect provides:

> "An Ordinance to regulate the opening and excavation of streets and sidewalks for the purpose of connecting any pipe or conduit with water, gas or sewer pipes or for any purpose whatsoever.
>
> Be it ordained by the City of Perth Amboy:
>
> 505a. Sec. 1. That any person or corporation who shall open, dig or excavate any street or sidewalk, or any portion thereof within the City for the purpose of connecting any pipe or conduit with any

> *water,* gas or sewer *main* * * * without first obtaining * * * a permit therefor * * *."

This clearly shows that the connection of the service pipe with the main is the exclusive function of the abutter and not of the city.

A municipality does not issue permits to itself.

As to what part of the street an abutting owner may open is answered in the case of *Tomei* v. *North Bergen Tp. in Hudson County,* 98 N. J. L. 668, 121 Atl. 780;

> "The title of lot owners is ordinarily coextensive with the middle of the street and while this private right of ownership may be regulated and controlled in the interest of the public by municipal legislation, the right of an abutting owner to open a street *fronting on his premises* for the purpose of connecting an existing building with existing or contemplated sewer, water or gas lines cannot be denied him so long as exercised in accordance with coexisting public rights in the street."

The City of Perth Amboy is in the business of selling water.

> "In selling water, municipality is governed by rules applicable to business corporations, since it exercises proprietary and business powers." *Austin* v. *Mayor of Union Beach,* 10 N. J. Misc. 670, 160 Atl. 318.

The Board of Public Utility Commissioners of the State of New Jersey proposed the Rules and Regulations for adoption by water utilities. The last paragraph of Rule 2, provides:

> "Service pipes will not be installed when the service pipe passes over or through premises which at

> the time may be the property of persons other than the owner of the premises to be supplied, unless the owner of the premises supplied assumes the liability." *Public Utility Law in New Jersey*, Brown, page 510.

There is no authority for the proposition that the laying of a service pipe for the respondents through the land of the petitioner is an absolute right that the municipality enjoys, except the judgment here sought to be reviewed. Such a right is contrary to the immunity contained in the 5th and 14th Amendments of the Federal Constitution. (*Missouri Pacific Ry.* v. *State of Nebraska Etc.*, 41 L. ed. 489, 164 U. S. 403.)

The Act of 1917, Chapter 152, page 436, Laws of New Jersey, provides that

> "The owner of any house * * * or lots shall be liable for the payment of the price * * * as fixed by said governing body for the use of water and for installation, purchase price, repair * * * of any * * * connections * * * hereafter furnished or made by such municipality, or any department thereof * * * connecting with such house * * *"

and goes on to make such price a lien on the said house or lot.

It is submitted that if a service pipe were a public or street use and not a private use there would have been no necessity for a passage of this act as mains or submains being a public use, a tax is assessed against those benefited and taxes of course are liens *per se.*

The enabling act of the New Jersey Legislature on the subject provides:

> "That the board of water commissioners or other body or officers who are authorized by law to manage any water works, shall have the privilege, if they deem it best, to permit *any person* or persons, *over or through whose land or in front of the same* any pipe may be laid, to connect with said pipe, upon their complying with such terms and regulations as such water board may require, and upon paying the regular rates for the use of said water." P. L. 1883, p. 176.

The foregoing permission of course is to connect with that portion of the main which runs over, through or in front of the land of the one doing the connecting, and not that of his neighbor.

Given that the laying of the service pipe by the respondents through the land of the petitioner is a private use, the petitioner has had his property taken from him for a private use contrary to basic and essential principles of free government. *Opinion of the Justices,* 204 Mass. 607, *Salisbury Land & Improvement Co.* v. *Commonwealth,* 215 Mass. at 376.

In 20 years an easement vests in New Jersey, making the petitioner's land servient to that of the respondents.

> "It is fundamental in American jurisprudence that private property cannot be taken by the government national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments." *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239, 49 L. ed. 462 at 467.

POINTS 2 AND 3.

Petitioner was deprived of his property for a private use and was denied due process and the equal protection of the laws by the substitution of the name *"submain"* by the appellate courts below, a name dehors the record before them, for the offending *"service pipe."*

The Appellate Division and the New Jersey Supreme Court, each departed from the record and reason, by naming and classifying the offending service-pipe as a submain to justify the unconstitutional taking and thus subjected the petitioner to further denials of his constitutional rights and immunities.

The respondents were the successful movants for the summary judgment so erroneously entered in the court of first resort below. In support of their motion they filed an affidavit by one Reager, an expert in the field involved and endowed with an awareness of technical distinctions as to nomenclature for water conducters, and in that affidavit (R9a) he swears:

> "The water line in question comes from a 4" water main which is imbedded under ground in the northerly side of Hall Avenue. *A 1¼ inch galvanized iron water service* is connected to the aforesaid 4 inch water main * * *"

Respondents' affiant and expert further prepared a sketch of the premises of the parties showing the *locus in quo* and the offending installation. That sketch appears opposite page 12a of the Record. It was an integral part

of the record in all the courts below. It shows a 4″ main and it shows the offending 1¼″ Galvanized Iron *Water Service,* so named by him, the respondents' witness and an expert. There is no other evidence, there was no other evidence before any of the courts below from which it could be inferred that the offending installation was a *submain.* In Reager's second affidavit, appearing on page R. 17a, speaking of the offending installation, swears:

> "We then installed *a new water service pipe to his property and to the property of Michael Stofega,* who made the same complaint. Soboliski and Stofega *were not billed for the work* because we felt that we were responsible to provide adequate service. These parties *had paid for* the original service which proved to be inadequate. The new installation as shown on the attached sketch, connected the new services to a 4″ water main delivering water at a higher pressure than the 12″ main to which they were formerly connected."

Here, the same sketch (opp. R. 12a) is referred to.

The Appellate Division of the Superior Court of New Jersey, the forum of petitioner's first appeal from the summary judgment, hung its decision of affirmance on this rationale:

> "Plaintiff maintains that the use of the street in this instance is private rather than public, * * * —solely by reason of the fact that defendants' are the only properties served by the submain of which he complains, but this is without substance—the laying of the submain is a public usage and the number of individual connections made thereto is wholly immaterial."

This court understood the simple issue, but it saw fit to make a *main* out of a *service pipe* and voila! the issue disappeared. No one contended before this court that the laying of a main or submain was not a public use. On the contrary, that it was, was exactly what the petitioner did contend. Furthermore, en passant, the reason assigned in the above excerpt from the Appelate Division's opinion for our contention that the offending service pipes were a private use, is made out of the whole cloth. No such reason pertaining to the number of users, appeared in petitioner's brief nor in oral argument.

The decision of the Appellate Division was appealed from to the New Jersey Supreme Court and we quote from petitioner's brief filed in that court of last resort:

> "The Appellate Division bases its decision on a change in facts that finds no support in the record. It calls the offending service pipes a submain. This is a term of which defendants' counsel is the nomenclator. It first appears in their brief. In the affidavit of John J. Reager, the Superintendent of the Perth Amboy Water Department (defendants' witness), the lines in question are called 'a 1¼ inch galavanized iron water service' (R. 9a-26). In the exhibit (also defendants') it is also called a 'water service' (R. 13a). In the opinion of the judge rendering the summary judgment it was 'the simple situation of a water line servicing property by going across the front of the plaintiff's property * * *' ".
>
> "Defendants' proofs do not show the existence of any 'sub-main' ".
>
> "We deny these pipes are a sub-main. If this factual issue had existed below, how can judgment summary be entered?"
>
> "Can the Appelate Division change the facts?"

> "'* * * except in small villages no permanent main should be smaller than 6 inches; in some communities 8 inch pipe is the established minimum.' *Waterworks Handbook*, Flinn, Weston & Bogert, page 391, Pipe Size Limits, under Disttribution Systems. McGraw-Hill."

"Perth Amboy has a 12" water main and the hydrants are serviced by the 4" main to which the defendants' service pipes were tapped (R. 17a-22)."

"The dictionary defines 'main' as follows:

> "A chief conduit-pipe or conductor, as for conveying water, gas, electricity or the like." *New Standard Dictionary.*

"and 'water-main', thus:

> "A principal pipe for conveying water, having lateral service pipes connected with it" *ibid.* page 2683

"and 'service-pipe' as:

> "A pipe leading water *from a main* to a building." *ibid.* p. 2235.

"On Hall Avenue, in Perth Amboy, there is a 12 inch water-main passing the properties of the defendants (R. 17a-26) to which their service pipes, like those of all of the other property owners on that thoroughfare were formerly connected."

"The Superintendent of the Water Department of the City of Perth Amboy in his affidavit states:

> "We then installed a new water *service-pipe to his property* (Soboliski) and to the property of Michael Stofega, who made the same complaint" (R. 17a-15).

"Where in all of the record, or in the realm of reason for that matter, does it appear that the offending installation was a sub-main?"

"In this brief as well as in the brief below, we stated:

> 'Insofar as water pipes are concerned, the public easement extends to the laying of mains and pipes for the servicing of the public as a whole * * *.'"

"We are not appealing from a situation that entailed a 'sub-main.'"

"The 1¼ inch installation is a 'service-pipe' and the learned court below is bound by the record."

> "'As a general rule the appellate court is confined in its review of the case, to the record sent up. Matters not shown by the record proper, or presented by a bill of exceptions, *statement of facts,* etc., cannot be considered." 4 C. J. 39, sec. 1611.

"Nowhere in the record can there be found any mention of a 'sub-main.'"

> "'It is a rule of wide application that an appellate court can consider nothing that is not contained in the record, and will not pass on a question not raised by the record. The sole question which such court is required to determine is whether the judgment which is the subject of review is a legitimate conclusion *from the premises which the record contains.*'" 4 C. J. 533, sec. 2365.
>
> "Statements of counsel * * * in briefs * * * as to matters which do not otherwise appear in the record will not be considered by the appellate court." 4 C. J. 557, sec. 2365. (Transcript Pb).

The foregoing somewhat lengthy quotation from brief filed by petitioner in the court of last resort in the State of New Jersey shows that due process and the equal protection of the law was denied your petitioner by the intermediate appellate court and was squarely placed before the New Jersey Supreme Court.

Not only did that last named court ignore the matter, but it, in its turn, adopted "sub-main" dehors the record

as it was, as an established given fact. This is judicial denial of due process in its primary sense. *Brinkerhoff-Faris Trust & Sav. Co.,* v. *Hill,* 281 U. S. 673, 74 L. ed. 1107 at 678, 680 and 1112 and 1113 respectively.

Truth is not only violated by falsehood; it may be equally outraged by silence.

The opinion of the learned court below left-handedly admits the trespass and after grudgingly admitting that a Federal question of "taking property without due process" was "apparently" asserted by your petitioner, questions the substantiality of the constitutional question implicit in the deprivation of property rights and suggests that petitioner's appeal might have been dismissed.

A motion to the jurisdiction had been made and argued before the New Jersey Supreme Court prior to the argument on the merits of the appeal and that august tribunal decided that a Federal constitutional question was asserted and heard the appeal argument on its merits.

And yet the learned Justice writing the opinion below states in it that petitioner "made no reply" to respondents' contention that petitioner had shown no ground for appeal!

How substantial can a constitutional question get? When the court of first resort says the municipality enjoys the absolute right to lay another's *service-pipe* through petitioner's land, and the Appellate Division changes the record, and says the city has a right to lay *a main* and when petitioner in his beautiful faith in ultimate justice turns to the highest judicial tribunal he is told, "we ought to send you home, come back with something substantial,

but we'll give you a break and decide this on its merits", and then, lo and behold, what happens? The question of whether or not the water department's ditchdiggers were or were not the agents of the respondents is decided by the court of last resort in an appeal from a summary judgment erroneously entered for the reason, inter alia, that the question of agency was a material fact in issue controverted or challenged! ! !

The pleadings and the affidavits clearly establish that the question of agency was controverted.

Incidently the statutes herein set out *supra* show that the water department makes the private connections and charges the landowner who must obtain the permit if he wants service, a clear showing of agency by operation of law.

Be that as it may, the appellate court has no more right to determine controverted issues of fact than the court of first instance had to render summary judgment when such challenged facts exist. This in itself constitutes denial of due process and denial of the equal protection of the laws. To state the proposition proves itself.

The learned Court below has attempted to cast the admittedly asserted constitutional question into the form of an unreviewable finding of fact.

Conclusion.

The petitioner's property was wrongfully taken from him for a private use contrary to rights guaranteed by the Federal Constitution and he was denied his day in court

of first resort, intermediate resort and last resort in the State of New Jersey and was denied due process and the equal protection of the laws by the entry of the summary judgment and the two affirmances thereof. The Judgment should be reversed.

Respectfully submitted,

Paul C. Kemeny,
Attorney for and of Counsel
with Petitioner.

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Office - Supreme Court, U.S.
FILED
MAR 14 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 611

MICHAEL STAREGO,

Petitioner,

vs.

JOHN SOBOLISKI and MICHAEL STOFEGA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Opinions Below

The opinion of the court rendering summary judgment, the New Jersey Superior Court, Chancery Division, appears at pages 25a to 28a inclusive of the Record and is not officially reported.

The opinion of the New Jersey Superior Court, Appellate Division, affirming the summary judgment, appears at pages 20a to 24a inclusive of the Record and is officially reported in 21 N. J. Super. 389, and in 91 Atl. Rep. 2nd, 263.

The opinion of the New Jersey Supreme Court unanimously affirming the judgment appears at page 29 of the Record, and is officially reported in 11 N. J. , and in 93 Atl. Rep. 2nd, 169.

Jurisdiction

Petitioner alleges that the jurisdiction of this Court should be invoked because of the entry of a judgment and the affirmance thereof depriving petitioner of private property for private use, without his consent, without due process and without equal protection of the laws, contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States.

Respondents deny that any constitutional question exists. Respondents aver that there exists no federal question of substance that has not heretofore been determined by the Supreme Court of the United States.

Questions Presented

1. Has private property been taken from petitioner for private use without compensation in a case where a City Water Department installs a water pipe underground in the area between the curb and sidewalk in front of petitioner's property, said area being outside of the petitioner's property line, and said area being land which is subject to public easement for underground utility pipes?

2. (a) Has petitioner been denied due process and the equal protection of the laws in proceedings where respondents moved for summary judgment on the pleadings and affidavits in the trial court, the proofs disclosed respondents' evidence was conclusive proof that respondents had complained of inadequate water pressure as a result of which the City Water Department acting as an independent agency installed a new water pipe without charge in the area between the curb and sidewalk in front of the

properties of the petitioner and the respondents, the affidavits for petitioner failed completely to challenge respondents' proofs, whereupon the trial court entered summary judgment for the respondents?

(b) Has petitioner been denied due process and the equal protection of the laws in proceedings where the entry of judgment in the trial court did *not* violate petitioner's constitutional rights, and petitioner alleges his constitutional rights were invaded because two appellate courts which affirmed the judgment wrote Opinions in which they may have comimtted harmless error by referring to a pipe by one name rather than another?

(c) Has petitioner been denied due process and the equal protection of the laws in proceedings where the issue in the trial court was whether respondents were guilty of a trespass because of the installation of a water pipe, and the trial court found them not guilty of trespass?

Statement of the Case

Petitioner is the owner of a tract of land 25 feet wide by 100 feet deep located on the southerly side of Hall Avenue, in the City of Perth Amboy, County of Middlesex and State of New Jersey (R. 1a). Respondent John Soboliski owns an adjoining tract of land located on the easterly side of petitioner's land and respondent Michael Stofega is the owner of a lot which in turn adjoins that of respondent Soboliski on the east (Sketch at R. 13a).

Prior to March, 1944, the respondents paid the City of Perth Amboy Water Department for their original water services which proved to be inadequate (R. 17a).

In March, 1944, respondents complained to said Water Department that they had insufficient water pressure, as a result of which the Water Department installed new water lines to the property of each respondent (R. 17a). The respondents were not billed for the work because the City Water Department felt responsible to provide adequate service; and the water lines were laid by the employees of the City of Perth Amboy Water Department under the direction of its superintendent who determined the location thereof (R. 8a). The respondents did not install said water pipes, did not direct the laying nor did they decide upon the location, and they had nothing to do with the laying of said lines; and the City of Perth Amboy Water Department was not the agent and servant of the respondents (R. 8a). The water line in question is a one and one-quarter inch pipe laid undeground in the area between the sidewalk and curb, the area where utility services are laid. The said water line comes from a four inch water main which is imbedded underground in the northerly side of Hall Avenue. This water line comes across Hall Avenue under the curb to a point one foot four inches south of the southerly side of the southerly curb on Hall Avenue, then runs in an easterly direction parallel with the southerly curb and distant one foot four inches southerly therefrom; and in front of the property of respondent Soboliski a one inch water service runs off said line in a general southerly direction into the building owned by Soboliski, and in front of the property of respondent Stofega a one inch water service runs off said line in a general southerly direction into the building owned by Stofega (R. 9a, 10a).

In December, 1951 petitioner instituted a suit in the New Jersey Superior Court, Chancery Division, against respondents alleging he is entitled to possession of a tract of land located on the southerly side of Hall Avenue in the

City of Perth Amboy, New Jersey, being 25 feet wide by 100 feet deep, that his right to posession accrued on February 11, 1937, that respondents have at all times since 1942 deprived him of possession by continuing trespasses by reason of water-pipe lines running from the lands of respondents and piercing petitioner's close and running through, under and across his premises without his permission. Petitioner demanded judgment for possession, injunction, damages and costs (R. 1a, 2a).

Respondents filed an answer alleging they had no knowledge or information as to petitioner's allegations that he is entitled to possession, and denying they have trespassed upon his lands (R. 3a).

Respondents served Interrogatories (R. 4a) asking the location of the water line and when and by whom said lines were laid.

Petitioner answered the Interrogatories (R. 5a) stating that the water line was laid under petitioner's land in the area between the sidewalk and curb on or about August 1942 by the agents and servants of the respondents, the identity of whom he did not know.

Thereupon respondents moved for judgment on the pleadings under Rule 3:12-3 of the New Jersey Superior Court, or, in the alternative, for summary judgment under New Jersey Superior Court Rule 3:56-1 (R. 6a). Respondents filed affidavits (R. 8a, 11a, 12a) in support of the motion.

Petitioner filed an affidavit (R. 14a) by a former mayor of the City of Perth Amboy as to the *custom* followed in the City of Perth Amboy, when he was mayor, in connecting to a water main, which affidavit is inadmissible in evidence because it is entirely hearsay. Petitioner filed his own affidavit (R. 15a) which failed to challenge any material fact in issue. Petitioner filed an affidavit by John

J. Reager (R. 17a) which failed to controvert any facts proved by respondents and which in fact is conclusive proof in favor of respondents.

The trial court dictated an oral opinion in open court (R. 25a) and entered summary judgment for the respondents (R. 18a).

Petitioner appealed to the Appellate Division of the Superior Court from the entry of said judgment (R. 19a). The Appellate Division affirmed the judgment, *Starego* v. *Soboliski,* 21 N. J. Super. 389, 91 Atl. Rep. 2nd, 263 (R. 20a).

Petitioner appealed to the New Jersey Supreme Court which affirmed the judgment, *Starego* v. *Soboliski,* 11 N. J. —, 93 Atl. Rep. 2nd 169 (R. 29).

Petitioner now prays for a Writ of Certiorari.

Summary of Argument

Petitioner alleges his private property was taken for private use and that he was denied due process and equal protection of the law contrary to the Fifth and Fourteenth Amendments to the Constitution.

The land in question is located outside of the tract described in petitioner's deed, being in the area between the sidewalk and curb, which land by well settled law is subject to the public easement for underground utility pipes. The City of Perth Amboy Water Department, and not the respondents, laid a water pipe in said area without charge, the location of the pipe being in the discretion of the Department. No trespass was committed.

The trial court properly entered summary judgment for respondents and could enter no other judgment. Respondents moved for summary judgment on the pleadings and affidavits which showed palpably that there was no genuine

issue as to any material fact challenged. Respondents' affidavits proved they had committed no trespass and that the City Water Department had laid a pipe where they had a legal right to do so. Petitioner relied on an affidavit of one Patten which affidavit set forth only hearsay inadmissible under the Rules of the trial court. The other affidavits submitted by petitioner failed to challenge respondents' proofs, and in this posture of affairs judgment had to be entered for respondents.

The entry of the original judgment did not violate the constitutional rights of petitioner and therefore the application for a Writ must be denied. Assuming that the two appellate courts committed harmless error by the use of certain words in their opinions, which is not admitted, the decision of the court of first resort properly entered, is the issue in the case at bar. The theory upon which the two appellate courts affirmed the judgment below is immaterial if the judgment was properly entered below. Therefore all of petitioner's argument concerning possible error in the language used by the two appellate courts has no merit.

The court of first resort entered judgment for respondents because the laying of the pipe is not a trespass by respondents and not because the pipe bears any particular name. The pipe in question is not the private water service of respondents. Their private water services are one inch pipes leading from their properties out to the street, and said private water services are not challenged by petitioner. The alleged offending pipe laid by the Water Department in the public easement to bring water to two private service pipes is not the private water service of the respondents, but is the property of the Water Department; and it can make no difference in the issue in the instant case whether said pipe is designated or called a water pipe, water service, main or sub-main in the official opinions of the appellate courts.

ARGUMENT

POINT I

The Supreme Court of the United States has no jurisdiction to review the judgment on the ground that private property was taken for private use contrary to the Fifth Amendment to the Constitution of the United States.

A. The land in question is subject to the public easement for water pipes.

The proofs disclose that petitioner owns a lot of land 25 feet by 100 feet in size (R. 9a). He makes no claim that the water pipe runs through any part of the land described in his deed. The evidence shows that said water line is ten feet eight inches north of petitioner's northerly property line (R. 13a, sketch) by calculation, and is underground.

The water line being outside of the property line of petitioner's land, petitioner must be relying upon the presumption of law that the owners of the land on each side of the street own to the middle of the street, and have the exclusive right to the soil, subject to the right of way.

Hinchman v. *The Paterson Horse Railroad Company,* 17 N. J. Eq. 75 at page 82. Petitioner has referred to this rule in the Petition. The argument is silent on this point.

This rule of law is qualified by the decisions holding that the rights of the abutting owner are subject to the public easement for passage, underground and above ground utilities.

> "A person who owns land across which a highway has been constructed owns the fee simple of the highway, subject only to the public easement, and

the public easement extends not only to the use of surface of the earth for purposes of passage, but also to the portion which lies beneath the surface whenever it is needed for *water pipes,* sewer pipes, gas pipes, or any other legitimate street use." *City of Bayonne* v. *Borough of North Arlington,* 76 N. J. Eq. 166, 75 Atl. Rep. 558, reversed on other grounds in 78 N. J. Eq. 283, 79 Atl. Rep. 357. *Winter* v. *Peterson,* 24 N. J. L. 524.

In *Saco* v. *Hall,* 1 N. J. 377, 63 Atl. Rep. 2nd 887, it was held that:

"The ownership of land over which a street has been laid is, for all substantial purposes, in the public, although the owner retains the naked fee to the middle of street, which on the assertion of the public right is divested of all beneficial interest. * * * The owner has the continued use of the fee only insofar as it does not interfere with the public user above or below the street. Such a right, however, is also subject to public regulation by law or ordinance."

The statutes of New Jersey give the City of Perth Amboy Water Department the right to lay mains and pipes.

"Every municipality providing for the supply of water in one or more of the methods provided in sections 40:62-47 to 40:62-105 of this title, may lay and maintain pipes and mains in and under the streets, highways, alleys and public places of such municipality and through private property therein; * * *." N. J. Statutes Annotated 40:62-65.

"Any municipality may relay, repair, enlarge and maintain all pipes and mains laid as provided in section 40:62-65 of this title and erect and construct

such fire hydrants as the governing body may deem expedient." N. J. Statutes Annotated 40:62-66.

Usually the municipal authorities are vested with discretion in respect of the place in the street where a main shall be laid, and where such discretion is exercised without fraud or corruption, it is not subject to judicial review. *Western N. Y. Water Co.* v. *Laughlin,* 157 N. Y. S. 257.

Under city charter providing that the water commission shall have the power to lay water mains through the streets, such commissioners could lay water mains, in spite of injury to the trees, along a certain space between a street and the sidewalk, independently of any authority conferred by the common council. *St. Mary of the Angels Church* v. *Barrows,* 124 N. Y. S. 571.

The sidewalk is part of the public highway. In *Harrison* v. *Montclair,* 105 N. J. Eq. 222, 147 Atl. Rep. 502, it was held that the abutting property owner has no vested right in sidewalks as against the state or its municipalities.

It is well settled that the owner of premises in question has no special rights in the use of the street and sidewalk in front of the property that are paramount to the rights of the public. *Morris* v. *Eisner,* 96 N. J. Eq. 538, 125 Atl. Rep. 573; *Kennelly* v. *Jersey City,* 57 N. J. L. 293, 30 Atl. Rep. 531.

In *Halsey* v. *Rapid Transit,* 47 N. J. Eq. 380, 20 Atl. Rep. 859, it was held that the erection of poles in front of premises did not impose a new and additional servitude upon plaintiff's land in the street, that lands taken for streets are taken for all time, and if taken upon compensation, compensation is made to the owner once for all, the compensation being awarded on the basis that he is to be deprived perpetually of his land. The Court in the same case stated:

> "Has the complainant's land in the street been appropriated to a purpose for which the public have no right to use it? It is of the first importance in discussing the question to keep constantly before the mind the fact that the *locus in quo* is a public highway, where the public right of free passage, common to all the people, is the primary and superior right. The complainant has a right in the same land. He holds the fee subject to the public easement. But his right is subordinate to that of the public, and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest."

As a matter of argument, suppose the Water Department of the City of Perth Amboy had laid the pipe in question fourteen feet north of the southerly curb. (See R. 13a, sketch.) Could petitioner complain? If such a water line serving two homes and laid fourteen feet north of the curb be an illegal trespass on his lands, let us assume that the Water Department would move the water line to a point four feet south of the northerly curb. Thus, if the same pipe fourteen feet north of the southerly curb be a trespass on petitioner's land, *a fortiori*, the same pipe laid four feet south of the northerly curb must be a trespass on the land of the owner of the lot on the northerly side of Hall Avenue opposite petitioner's property. If petitioner's contention is correct, the Water Department can lay no pipes in the street in front of the property of the petitioner or of his neighbor accross the street.

Let us assume that the Water Department laid the same pipe one foot north of the southerly curb. Is the situation then any different than where the pipe was laid fourteen feet north of the southerly curb? Certainly not. How does that differ from the instant case? There can be no

difference if the pipe is one foot four inches south of the curb, one foot north of the curb, fourteen feet north of the curb or four feet south of the northerly curb. In each case the Water Department has the discretion to decide in what part of the street to locate a water line serving taxpayers, and if the department decides to follow modern procedure by placing the pipe underground in the area between the curb and sidewalk to avoid the costly expense of tearing up and replacing pavement in the road, even if trees inside the curb are damaged, such discretion is not subject to judicial review.

Western N. Y. Water Co. v. *Laughlin, supra;*
St. Mary of the Angels Church, v. *Barrows, supra.*

There is no distinction between the land lying between the property line and curb and the land from the curb to the center of the street. If petitioner's contention is correct, every municipality and utility company in New Jersey could be forced to remove every pipe and electric light pole and wire now located in the area between the curb and sidewalk everywhere within the territorial limits of the State of New Jersey.

There is no distinction between an underground pipe and an above ground pole or wire. Does petitioner contend that every utility electric light pole must be removed from the space between the curb and sidewalk to some point between the curb and the middle of the street?

The absurdity of petitioner's position is easily illustrated by the following situation: Let us assume that an electric light utility company has poles and wires in the area between sidewalk and curb running a distance of 100 feet along a side street to supply service to existing houses, that later a new home is built 400 feet down the same side

street, that the company extends its poles and wires a distance of 300 feet along the inside of the curb to supply the new home with service, and that only the one new home owner obtains any benefit from the additional 300 feet of wires and poles. Can the extra 300 feet of wires and poles be classed as the private poles and wires of the new home owner because he is the only one benefiting, and can the owner of a plot of land 200 feet down said side street bring trespass against the new home owner on the theory expounded by the petitioner herein? The above illustration and the instant case are alike.

It is obvious that petitioner's allegations that private land was taken for private use is not true because the land is subject to public easement for utility services, including the water pipe which forms the basis of the instant case.

POINT II

The Supreme Court of the United States has no jurisdiction to review the judgment on the ground that petitioner was deprived of his property without due process of law and was denied the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

A. The judgment was properly entered by the trial court.

New Jersey Superior Court Rule 3:12-3 provides:

> "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 3:56, and

all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 3:56."

New Jersey Superior Court Rule 3:56-1 provides:

"A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the service of the complaint, counterclaim, or cross-claim, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment or order in his favor upon all or any part thereof or as to any defense."

Respondents moved for summary judgment under the foregoing rules (R. 6a), filing affidavits (R. 8a, 11a, 12a and Sketch 13a). Petitioner filed affidavits (R. 14a, 15a, 17a).

What were the proofs before the trial court? The record discloses that respondents had paid the City of Perth Amboy Water Department for an original water service which proved to be inadequate, and in 1944 they complained of insufficient pressure, as a result of which the Department installed new pipes. Respondents were not billed for the work because the Water Department felt responsible to provide adequate service (R. 17a, filed by petitioner). The new water lines were laid by the employees of the City of Perth Amboy Water Department under the direction of the superintendent who made the decision as to location of the lines. These water lines were not laid by respondents, they did not direct the laying of the lines nor did they decide the location. The Water Department was not the agent and servant of the respondents and the latter had nothing whatever to do with the laying of the lines (R. 8a).

Respondent Michael Stofega never laid any of the water lines (R. 11a). Respondent John Soboliski never laid any of the water lines (R. 12a).

Therefore the affidavit of John J. Reager (R. 8a), the affidavit of Michael Stofega (R. 11a), the affidavit of John Soboliski (R. 12a), the Sketch (R. 13a), filed by respondents, and the affidavit of John J. Reager (R. 17a) filed by petitioner are conclusive proof that respondents complained of inadequate water pressure as a result of which the Water Department, acting as an independent agency, installed a new water pipe in the area between the sidewalk and curb in front of the properties of petitioner and respondents, and that the entire project was the sole responsibility of the City Water Department. It becomes obvious that respondents were guilty of no trespass.

Did the petitioner's affidavits controvert the proofs submitted by the moving party on the motion before the trial court?

The affidavit of Edward J. Patten (R. 14a) filed by petitioner was entirely inadmissible in evidence. New Jersey Superior Court Rule 3:56-6 provides:

> "Supporting and opposing affidavits shall be made on personal knowledge and shall set forth only facts which are admissible in evidence and to which the affiant is competent to testify. * * *"

The Patten affidavit says he *is* a member of the Bar and Clerk of the County of Middlesex, that he *was* mayor of Perth Amboy for six years. The affidavit has statements which purport to show the custom of the City of Perth Amboy Water Department when deponent was the mayor. The entire affidavit, except for the first paragraph, is purely hearsay, does not contain one statement of fact which is admissible in evidence and to which the affiant

is competent to testify. The custom of the Water Department in connection with pipes to homes *when deponent was mayor* is immaterial and irrelevant. The facts as to what happened are material. The Patten affidavit being worthless as evidence, the trial court could not consider the same.

An examination of the affidavit of petitioner (R. 15a) filed in the trial court discloses that it fails to challenge respondents' proofs. He states he is the plaintiff, the owner of the premises, and that the Water Department and Mr. Reager were not his agents in laying the pipes. There is not one word in his affidavit which controverts the proofs submitted by the moving party.

The affidavit of Reager (R. 17a) filed by petitioner is conclusive proof in favor of respondents. The Sketch (R. 13a) is likewise conclusive.

New Jersey Superior Court Rule 3:56-3 under which respondents moved for summary judgment provides, *inter alia*:

> "* * * The judgment or order sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show palpably that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. * * *"

The proofs showed palpably that there was no genuine issue as to any material fact challenged and that the respondents were entitled to judgment as a matter of law.

The Sketch (R. 13a) in evidence before the trial court was sufficient proof in favor of entry of the judgment for respondents on the basis of the well settled rule of law hereinabove set forth in Point I.

The question before the trial court was one of alleged trespass by respondents. But what act of respondents constituted a trespass? The record shows they are guilty of only one act, that of making a complaint to the Water Department of lack of water pressure. Is that trespass? On this ground alone the trial court had no alternative but to enter summary judgment for respondents. And as a result of their complaint of insufficient pressure respondents have had to defend an action in the trial court, two appellate courts, and now in the Supreme Court of the United States.

If it is the argument of petitioner that he was deprived of property without due process and denied the equal protection of the law on the theory that entry of summary judgment where there is no genuine issue as to material facts challenged is unconstitutional, the argument must fail (a) because petitioner has failed to make this claim and (b) because the procedure for entry of summary judgment where proofs show there is no genuine issue has been held constitutional.

> *Nolte* v. *Nannino,* 107 N. J. L. 462, 154 Atl. Rep. 831.

In *Pennoyer* v. *Neff,* 95 U. S. 714, it was held that the constitutional guaranty of due process as applied to judicial proceedings means "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights".

B. If the entry of judgment by the trial court did not violate petitioner's constitutional rights, petitioner's application for Writ of Certiorari must be denied.

Petitioner in Points 2 and 3 of his brief argues that the two appellate courts in New Jersey departed from the record and thus petitioner's constitutional rights were violated.

It must be noted that if the court of first resort entered a proper judgment, and if later the appellate courts committed harmless error (which latter supposition is denied by respondents), petitioner has not been denied due process and the equal protection of the laws. If the original judgment was proper, this application for a Writ must be denied. He has had his day in Court.

The summary judgment was properly entered for the reasons hereinabove set forth in Point I and Point II, A.

The judgment below was properly entered and was affirmed by two appellate courts. The reasons given by the appellate courts in their opinions are not material nor are they in issue. The decision of the trial court is the issue in the instant case. Petitioner's constitutional rights cannot be violated because of the language of an appellate opinion in proceedings where an original judgment against petitioner has not deprived him of his rights under the United States Constitution.

C. The trial court entered the judgment in favor of respondents because the pipe is not a trespass by respondents and not because the pipe was designated by any particular name in the appellate courts which later reviewed the decision.

The only question before the trial court was whether respondents committed a trespass by laying or causing to be laid a pipe in petitioner's *private* lands. The original

decision was based on the pleadings, affidavits and the law; and summary judgment was properly entered for respondents.

In the court of first resort it was not material whether the pipe was called a "pipe", "pipe-line", "water pipe", "water line", "service pipe", "main" or "sub-main". The issue was whether the pipe was an offending trespass on the private premises of petitioner. This was the simple issue decided by the trial judge. The original decision violated no constitutional rights of petitioner.

Petitioner alleges his constitutional rights were violated (Points 2 and 3 of Petitioner's Brief) because the appellate courts used the word "sub-main" which word he alleges did not appear in the record of the trial court. If this be error, at the most it is harmless error; for how can nomenclature in the decision of an appellate court affirming a proper judgment deprive petitioner of a constitutional right? The name of the pipe was not an issue. The pipe itself was the subject matter of the injunction suit.

The Sketch (R. 13a) discloses that the one and one-quarter inch pipe in question supplies two houses, and whether the pipe in question is called or designated a main, sub-main or service pipe is immaterial and cannot change the physical character and layout of the water system.

Petitioner urges that the alleged offending pipe is the private water service of the respondents. But in the case at bar the private water service of respondent Soboliski is the one inch water service running from his property in a northerly direction to a point where it connects with the one and one-quarter inch galvanized iron water pipe which lies one foot four inches south of the curb. Likewise the same is true of the respondent Stofega. The private water service of each respondent home owner is

only the pipe running from his property out to the street where it is tapped into the general supply lines maintained by the Water Department.

The portion of the water line complained of by the petitioner is actually a water main or sub-main or service pipe having two separate water services tapped off from it. Therefore it cannot be classed as the private water service of any individual property owner. The name of the pipe is not material. The piping system used in the instant case is a matter of everyday practice in the water supply business and is so elementary and well established that legal authority for the statement is virtually impossible to find.

Petitioner argues that the expert, Mr. Reager used the word "water service" in his affidavit (Petitioner's Brief, 17), and that the appellate courts used the word "sub-main", as a result of which petitioner has a grievance. Little did Mr. Reager realize that when he innocently used the generic term "service" in the affidavit and Sketch (R. 13a) to describe the alleged offending pipe, petitioner would seize upon this harmless play on words as an excuse to drag two innocent respondents through two state appellate courts and into the Supreme Court of the United States with a matter which has no genuine issue.

Let us suppose that the Water Department extended the water line in question in an easterly and westerly direction to serve additional property owners. Would the pipe in front of petitioner's property be a trespass by respondents on his land? If the Water Department removed the present pipe complained of and replaced it with a four inch or eight inch pipe, and likewise extended the pipe in an easterly and in a westerly direction to serve twenty home owners, would the pipe laid in front of petitioner's

property be a trespass by twenty persons on his land? Petitioner's contention is ridiculous. His application is without merit.

CONCLUSION

For the reasons stated, the application for Writ of Certiorari should be denied.

Respectfully submitted,

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March, 1953.